DORT Federal Credit Union

MAIN OFFICE
2845 Davison Rd.
Flint MI 48506
(810) 767-8390
(800) 521-3796

MAILING ADDRESS
P.O. Box 1635
Flint MI 48501-1635

HILL RD. BRANCH
1091 W. Hill Rd.
Flint MI 48507

PIERSON RD. BRANCH
5091 W. Pierson Rd.
Flint MI 48504

STATE RD. BRANCH
1441 S. State Rd.
Davison MI 48423

INTERNET
www.DortOnline.org

HOURS
Monday – Friday
8:00 A.M. to 6:00 P.M.

July 26, 2004

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave.
Washington, D.C. 20551

Re: Overdraft Protection Guidance; Docket Nos. OP-1198, 04-14, 2004-30

Dear Ms. Johnson:

This comment letter is submitted on behalf of Dort Federal Credit Union and its approximately 45,000 member-owners in response to the Inter-agency Proposed Guidance on Overdraft Protection ("Proposed Guidance") and request for public comment. We appreciate the opportunity to comment on this important matter.

Dort Federal thanks the Agencies for their attempt to provide guidance to depository institutions on overdraft protection programs. However, we believe that the level of detail in the Proposed Guidance will result in the imposition of significant costs and burdens on us (as the provider of an overdraft program) as we seek to "comply" with implementation. Another concern is that the guidance is so specific that it will restrict our flexibility in continuing to offer an overdraft program. This is not in our best interest, nor that of our members who have come to rely on this program due to its convenience and cost effectiveness. We have further concern regarding the number of generalizations or sweeping statements in the Proposed Guidance (specifically within the sections on "Legal Risks" and "Best Practices) that we believe may create legal risks for institutions (resulting from private parties and others referring to the guidance to support legal claims). We encourage and respectfully ask the agencies to withdraw the Proposed Guidance or, at a minimum, publish a revised proposal (including the opportunity for additional public comment). Below, we outline our specific concerns about the Proposed Guidance.

Safety and Soundness Considerations

The Proposed Guidance provides that "overdraft balances should generally be charged off within 30 days from the date first overdrawn." As a federally chartered credit union, a 45-day period generally applies under existing rules). The Proposed Guidance also states that even if an institution allows a consumer to cover an overdraft through an extended payment plan, the 30-day charge-off provision would apply.

We strongly disagree with this proposal. Nor do we believe that it is not necessary to achieve safe and sound banking practices. It may adversely impact consumers; given most consumers seek to repay overdrafts quickly. In addition, we actively pursue the prompt payment of overdrafts through the use of written and oral notices to our members. Please note that numerous situations arise due to, for example, the frequency or timing of wage payments (pension checks are often paid just once per month), for which members have little control, which may preclude them from repaying overdrafts in full within 30 days of the overdraft. If an account must be charged off within 30 days, it can be more difficult to collect payment for such amounts and, in fact, will endo up costing us, the institution more; a cost which will be passed on to our members and consumers by other institutions. Thus, we believe adoption of a 45-day charge off period, which also would be consistent with the time period that applies to federal credit unions like Dort Federal, enhances our ability to collect overdrafts and actually enable better risk management practices (while also providing better member/customer service).

With respect to reporting requirements, the Proposed Guidance states that overdraft balances should be reported as loans and overdraft losses should be charged against the allowance for loan and lease losses. It also states that when an institution routinely communicates the available amount of overdraft protection to depositors, the amounts should be reported as "unused commitments" in regulatory reports. While we do not routinely report the available amount of overdraft protection to our members, we respectfully disagree with the approach and believe that it is more appropriate to net overdraft balances against deposits because no agreement exists with respect to the overdrafts. Consider that negative balances occur daily at our institution, without regard to overdraft protection programs, and these balances are not classified as loans nor are they subject to immediate charge-off policies. We believe that overdraft balances resulting from our overdraft program should be treated the same way. In addition, to the extent these balances are not treated as loans, available amounts also should not be reported as "unused commitments" in regulatory reports.

Legal Risks

Truth in Lending Act

The Proposed Guidance states: "when overdrafts are paid, credit is extended." It then discusses the treatment of overdraft fees and finance charges under Regulation Z. We strongly disagree with this statement. Courts and other entities have reviewed this question and they generally have concluded that an overdraft is not credit under the Truth in Lending Act, unless it is a line of credit established by written agreement. Any determination or statement that an overdraft is "credit" should only be made in connection with a full discussion and consideration of existing legal precedent on this issue. There does not appear to be any reason to include this statement since the guidance implicitly notes that overdrafts are not covered by Regulation Z because the fees are not considered finance charges. Also note that the FRB's recent proposed amendments to Regulation DD, which solely covers deposit accounts and not credit, makes it clear that overdraft programs are not credit.

Equal Credit Opportunity Act

While we believe that no institution should discriminate against persons on the basis of race and other factors, we do not believe that the ECOA should be deemed to apply to overdraft programs. The ECOA applies to credit extensions and credit is defined as the "right" granted by a creditor to a person to defer payment of debt. Overdraft programs do not involve a "right" granted by institutions. No rationale or reason is provided for the ECOA to cover overdraft programs. Such a statement could easily lead to significant litigation by individuals, without regard to any evidence of discrimination or improper treatment. Overdraft programs are a part of deposit accounts, as the FRB's recent amendments to Regulation DD provide. Therefore, these programs cannot be deemed credit. For this reason, we believe it is essential for the Agencies to not include any discussion about the ECOA in any final guidance. Additionally, the statement that overdraft programs that are not covered by TILA would generally qualify as incidental credit under Regulation B is simply too sweeping a statement, and should be deleted from any final guidance.

Best Practices

While several of the "best practices" identified in the Proposed Guidance are helpful and appropriate, a number of the "suggestions," if adopted, would require us to implement costly and significant changes to our program (costs that would be passed on to members/consumers). Several of the suggestions are simply not technologically feasible. We are concerned that while the provisions are "best practices," examiners, courts, and other parties will view the provisions as requirements and expect institutions to comply specifically with these provisions. We therefore ask the Agencies to delete the provisions discussed below.

Marketing and Communications with Consumers

Fairly Represent Overdraft Protection Programs and Alternatives

We are concerned about the broad-based perspective of the suggestion that we as an overdraft program provider, "explain to consumers the costs and advantages of various alternatives to the overdraft protection program" and identify the risks and problems in relying on the program and the consequences of "abuse." This suggestion micro-manages the way in which we provide information and is simply not necessary. Providing a detailed cost-benefit analysis of the alternatives to overdraft programs will require the creation of a lengthy and complicated document (the longer and more complicated disclosures become, the less effective and useful they are to consumers). We make significant amounts of information about out products and services available to current and potential members, including lines of credit and other products. This information is made available through numerous channels, such as websites, via telephone, and in branches. It is simply unnecessary and inappropriate for the Agencies to dictate our marketing and communication approaches. We recommend deletion of this provision.

Train Staff to Explain Program Features and Other Choices

The suggestion within the Proposed Guidance that our staff explain how to "opt-out" of overdraft services is discussed later in this comment letter.

Explain Check Clearing Policies

An institution's check clearing policies (i.e., payment order of checks) is incidental to the operation and use of an overdraft program. We strongly oppose inclusion of any provision dealing with it. The issue is outside the scope of the purpose of providing information about overdraft programs. While some institutions may choose to communicate such information, doing so can be very detailed as it may relate to checks and other channels through which consumers can withdraw funds, and the Agencies suggestion of a "clear" disclosure could require a lengthy and detailed document.

Program Features and Operation

Provide Election or Opt-Out of Service

We strongly oppose the suggestion that institutions require consumers to "opt-in" before providing overdraft services or, alternatively, permit consumers to opt-out of an overdraft program. We fully apprise members when we may honor an overdrawn item, instead of returning the item unpaid and having a merchant or other party assess a fee, in addition to the "NSF" fee charged by the account-holding institution. Providing an "opt-in" notice to consumers for overdraft programs is not supported by existing law, and we believe that institutions currently do not use such an approach. It would work great hardship on consumers and would result in consumers paying greater amounts for checks returned unpaid (due to merchant fees, for example).

There is no basis for requiring the provision of an "opt-out" notice to consumers. This would impose significant costs and burdens on institutions and likely would result in significant litigation, due to the potential creation of a consumer "right," by the provision of such notices. For example, questions could be raised as to whether the notice is clear, the scope of the right, and numerous other issues. We urge the Agencies to delete this provision.

Alert Consumers Before a Non-Check Transaction Triggers any Fees

We also oppose the suggestion that institutions provide a notice "when feasible" *before* completing a transaction, that a transaction may overdraw an account. What does "when feasible" mean? Technologically, an institution likely could not implement such a requirement. Because systems that permit access to funds do not operate in "real time," it is simply impossible to know whether, at the time of a withdrawal, a specific transaction will overdraw an account. For example, withdrawals at ATMs are often not completed in "real-time." In addition, even if a transaction occurs in real-time, other transactions, such as withdrawals by check, are not integrated into the "real-time" evaluation of a consumer's funds on deposit, and it is impossible to know, at that time, if a transaction will overdraw an account, because of the processing of other deposits and withdrawals.

We also disagree with the suggestion that we post a notice at ATMs explaining that withdrawals in excess of the balance of funds in a consumer's account will access the overdraft protection. Such a notice would confuse or, at a minimum, mislead members. For example, many consumers that use other institutions' ATMs do not have accounts with those institutions, and such a notice could confuse those consumers. In addition, a number of an institution's own customers may not have use of that institution's overdraft program. Such a disclosure at an ATM would confuse and potentially mislead these consumers. In addition, some overdrafts that occur may be processed by institutions by "sweeping" funds from other deposit accounts held by the consumer, or by use of a line of credit. Overdrafting occurs only "after" these alternatives are exhausted. The disclosure of only one type of program in which an overdraft may be honored likely will confuse consumers who have other programs in which withdrawals in excess of the balance may be honored. The Agencies should not adopt this section.

Promptly Notify Consumers of Overdraft Protection Program Usage Each Time

While, in general, we agree that institutions should notify consumers when overdraft services have been triggered, we recommend the agencies modify this provision. Specifically, the reference to sending a notice to consumers "the day" the overdraft program has been accessed is not possible in many instances. Remember that many transactions are simply not processed in real-time. Thus, we suggest this provision simply provide that institutions "promptly" notify consumers of the overdraft. In addition, it may be desirable for notice to be provided through means other than email or by a paper notice, such as by telephone, to ensure speedy notice is provided. This provision should clarify that such notice can be provided orally, if it is deemed the most effective means of "delivery" by the institutions or even the member/consumer.

Again, Dort Federal Credit Union appreciates the opportunity to comment on this important matter. If you have any questions concerning these comments, or if we may otherwise be of assistance, please do not hesitate to me at tgisewhite@dortfcu.org.

Sincerely,

Tom Gisewhite,
VP Marketing and Business Development
Dort Federal Credit Union